

PATENT
4035-0116P

IN THE U.S. PATENT AND TRADEMARK OFFICE

In re application of Before the Board of Appeals

Yoshito SHIBAUCHI et al. Appeal No.

Appl. No.: 09/675,671 Group: 1761

Filed: September 29, 2000 Examiner: L. TRAN

For: METHOD FOR PRODUCING LAMINATED CHEESE AND A DEVICE THEREOF
AND LAMINATED CHEESE FOOD THEREBY PRODUCED

**SUBSTITUTE BRIEF ON APPEAL ON BEHALF OF APPELLANT
FILED UNDER PROVISIONS OF 37 C.F.R. § 1.192**

Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

May 10, 2004

Sir:

This Substitute Appeal Brief is submitted in response to the Notice of Non-Compliance dated April 30, 2004, and replaces the Appeal Brief filed on January 28, 2004 from the Final Rejection of January 29, 2003, of claims 12-16 in the above-identified application.

The Examiner is advised that Section V of the Appeal Brief is amended herein to address the issues pointed out by the Examiner in the Notice of Non-Compliance.

05/12/2004 RHEBRAHT 00000049 022448 09674671

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02 FC:1253 530.00 DA



MS APPEAL BRIEF - PATENTS
PATENT
4035-0116P

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Yoshito SHIBAUCHI et al.

Appeal No.:

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09/674,671

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September 20, 2000

Examiner:

L. TRAN

Conf.:

3850

For:

METHOD FOR PRODUCING LAMINATED CHEESE
AND A DEVICE THEREOF AND LAMINATED
CHEESE FOOD THEREBY PRODUCED

SUBSTITUTE APPEAL BRIEF TRANSMITTAL FORM

MS APPEAL BRIEF - PATENTS
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

May 10, 2004

Sir:

Transmitted herewith is a Substitute Appeal Brief (in triplicate) on behalf of the Appellants in connection with the above-identified application.

The enclosed document is being transmitted via the Certificate of Mailing provisions of 37 C.F.R. § 1.8.

A Notice of Appeal was filed on June 30, 2003.

Applicant claims small entity status in accordance with 37 C.F.R. § 1.27

The fee has been calculated as shown below:

Extension of time fee pursuant to 37 C.F.R. §§ 1.17 and 1.136(a) - \$530.00 (paid on January 28, 2004).

Fee for filing an Appeal Brief - \$330.00 (large entity) (paid on January 28, 2004).

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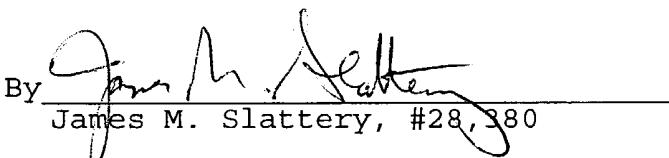
Check(s) in the amount of \$860.00 submitted on January 28, 2004.

Please charge Deposit Account No. 02-2448 in the amount of \$0.00. A triplicate copy of this sheet is attached.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. §§ 1.16 or 1.17; particularly, extension of time fees.

Respectfully submitted,

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4035-0116P

Attachment(s)

(Rev. 02/08/2004)

I. REAL PARTY IN INTEREST

As evidenced by the Assignment filed September 29, 2000, and recorded at Reel 011959, Frames 0940-0942, the Real Party In Interest in connection with the present application is the Assignee of record, Snow Brand Milk Products, Inc.

II. RELATED APPEALS AND INTERFERENCES

There are no pending Appeals or Interferences related to the present application known to Appellants or Appellants' Legal Representatives.

III. STATUS OF CLAIMS

All of claims 12-16 stand rejected.

IV. STATUS OF AMENDMENTS

An Amendment After Final Rejection was filed on January 29, 2003. In an Advisory Action mailed June 17, 2003, the Examiner stated that the Amendment filed May 27, 2003 would be entered upon filing of an Appeal Brief.

Accordingly, all Amendments filed in the present application have been entered.

V. SUMMARY OF INVENTION

The present invention relates to a Method for Producing Laminated Cheese And a Device Thereof and Laminated Cheese Food Thereby Produced.

The invention of independent claim 12 concerns a laminated cheese food, including a multilayer structure produced by piling a plurality of laminated cheese foods, each of the plurality of

laminated cheese foods of the multilayer structure having at least three layers, the at least three layers including:

two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled; and an intermediate layer of platy food material, wherein the intermediate layer may be formed of a plurality of intermediate layers of platy food material which inherently bond together, the intermediate layer being disposed between and being inherently capable of bonding to the two external layers of platy food material,

wherein each of the plurality of laminated cheese foods of the multilayer structure is releasable from the adjoining ones of the plurality of laminated cheese foods of the multilayer structure.

The invention of independent claim 13 concerns the invention of claim 12, wherein the platy food material in the intermediate layer is cheese different from the cheese contained in the platy food material in the external layers in type or colour tone, or is cheese having higher maturity, more water or fat, thus being softer, or having lower pH, than the cheese contained in the platy food materials in the external layers.

The invention of independent claim 14 concerns the invention of Claim 12, wherein the platy food materials in the intermediate layer contain foods other than cheese which are in a liquid, paste, powdery, solid, or fibrous state.

The invention of dependent Claim 15 concerns the invention of Claim 12, wherein the platy food materials in at least one of the external layers or the intermediate layer contain additives or raw

materials for adjusting colour tone, and the colour tones of the platy food materials in the external layers or the intermediate layer are the same or different.

The invention of dependent Claim 16 concerns the invention of Claim 12, a package being formed by wrapping the multilayer structure produced by piling said plurality of laminated cheese foods, each of said plurality of laminated cheese foods having said at least three layers.

The novel combination of elements set forth in each of claims 12-16, can be found in the original specification, for example, on pages 20-21, wherein it is disclosed that "In the external layers (A), (B), the inventor used a releasable platy food material containing cheese.....".

A copy of FIG. 7, attached in Appendix C, illustrates a multilayer structure produced from piling a plurality of laminated cheese foods t1, t2, t3, etc, each of these laminated cheese foods including external layers A, B, and intermediate layer C, the plurality of laminated cheese foods t1, t2, t3, etc. forming a pile t.

VI. ISSUE

The issue presented for review is whether Mayfield (U.S. 5,928,692) in view of Mally et al. (U.S. 4,832,970) and Nakajima (U.S. 4,670,276) suggest all of the elements set forth in claims 12-16 to properly support a rejection under 35 U.S.C. § 103.

VII. GROUPING OF CLAIMS

Appellants submit that claims 12-16 stand together as Group I.

VIII. ARGUMENTS

A. Group I, Independent Claim 12 and Dependent Claims 13-16

Mayfield in view of Mally et al. and Nakajima do not suggest all of the elements set forth in claims 12-16 to properly support a rejection under 35 U.S.C. § 103.

1. The Mayfield Reference

It is respectfully submitted that the combination of elements set forth in independent claim 12 is not disclosed or made obvious by the prior art of record, including Mayfield, Mally et al., and Nakajima.

In contrast to the Appellants' invention, the Mayfield document indicates that Mayfield fails to disclose a multilayer structure produced by piling a plurality of laminated cheese foods, each of said plurality of laminated cheese foods having at least three layers, each of the at least three layers, including two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of platy food materials when piled, and an intermediate layer of platy food material.

The Appellants concede that Mayfield discloses that the amorphous layers 12 and 14 of product 10 may be cheese (For example, see Mayfield column 4, line 52), but that the amorphous layers making up the food product 10 are wrapped with a non-amorphous film 20 made by mixing a gelling substance such as gelatin, pectin, or agar with water (For example, see Mayfield column 4, lines 1-4), and is perfectly clear, odorless, and tasteless (For example, see Mayfield column 4, lines 30-31).

Thus, there is no disclosure whatsoever that the amorphous layers 12, 14 of Mayfield (even if they do contain cheese) are inherently releasable. In fact, Mayfield teaches the opposite, that the

amorphous of Mayfield is sticky and messy, and as such, are not releasable. Further, as repeatedly disclosed in the Mayfield document, Mayfield teaches, that since amorphous layers (which may or may not contain cheese) are sticky and messy, that each amorphous layer is wrapped in a non-amorphous layer not containing cheese.

Examples of the Mayfield teachings include:

a. Mayfield Amorphous Layers Sticky and Messy, and Thus Are Separated

From Each Other by a Non-Amorphous Edible Film:

In Mayfield column 3, lines 8-12: "Thus, there remains a need for preparing and packaging such sticky edible products in manners which would allow easy handling of such products and will not permit transfer of moisture from such products to other products which come in contact with such sticky products".

In Mayfield column 3, lines 17-24: "The present invention addresses some of the above-noted problems and needs relating generally to the handling and use of sticky food products and provides methods of coating and/or covering such food products with edible, substantially non-sticky materials for use during preparation of such food products and methods for packaging such coated food products for long term storage, shipping and handling of such food products".

In Mayfield column 5, lines 55-65: "Although the sandwich-sized slice is sealed in a film, the food and film may be eaten together because the film is edible. Preferably, the film dissolves immediately when eaten and either provides no flavor or an agreeable flavor. For mass production, each sandwich-sized slice is wrapped and sealed in a non-edible plastic film to provide single-slice servings. Alternatively, a separator sheet may be placed between the sandwich-sized slices forming a stack which may be packaged in a non-edible plastic packaging or other suitable packaging".

In Mayfield column 7, lines 19-31: With reference to FIG. 2, a sandwich 40 is shown in perspective. A sandwich filler 42 is sandwiched between a first slice 44 of bread and a second slice 46 of bread. An edible film 48 encloses and seals an amorphous, semi-solid food within. The edible film 48 provides a moisture barrier around the amorphous, semi-solid food. As a moisture barrier, the edible film 48 reduces sogginess in the first and second slices of bread 44. The edible film 48 allows one to handle the amorphous, semi-solid food without contact with the amorphous, semi-solid food, which may be sticky and messy.

In Mayfield column 7, lines 38-60: "Numerous examples can be provided of foods and/or edible films according to the present invention. An example of using an edible film as a moisture barrier is with a cheese and cracker sandwich, where the edible film provides a moisture barrier between the cheese and the crackers, preventing sogginess and/or staleness in the cracker".

b. The Mayfield Edible Non-Amorphous Film, Which Separates the Amorphous Layers, Does Not Contain Cheese:

In Mayfield column 4, lines 1-4, "a non-amorphous film 20 made by mixing a gelling substance such as gelatin, pectin, or agar with water", and

In Mayfield column 4, lines 30-31, "is perfectly clear, odorless, and tasteless".

2. The Mally et al. Reference

Mally et al. is directed to stuffed proteinaceous patties including the following materials piled, one atop the other, from bottom to top: a lower patty 27, cheese layer 51, a condiment 59, cheese layer 52, and an upper patty 58. (See column 6, lines 26-31, column 7, lines 6-12, and FIG. 3). Further, as disclosed in the Abstract, the resulting pile of materials is then "knitted together, and the filling (cheese layer 51, condiment 59, and cheese layer 52) is encapsulated therewithin".

Thus, since the Mally et al. layers 51 and layer 52 do not contact each other because of the condiment which separates them, and since the resulting filling is then knitted together and encapsulated in the proteinaceous patty, there is no possibility in Mally et al. that layers 51 and 52 are releasable from each other.

3. **The Nakajima Reference**

Nakajima (abstract) is directed to a sandwich-like food including surimi in first and second continuous sheets; and molten cheese mixed with minced salami, which is placed on the first sheet of surimi and covered by the second sheet of surimi. The food is then pressed into a sandwich form and dried to form a dried sandwich-like product.

Since the Nakajima food is directed to molten cheese mixed with minced salami which is covered on both sides by a sheet of surimi, there is no cheese-to-cheese contact. Moreover, since there is no suggestion in Nakajima that there is cheese-to-cheese contact, there can be no suggestion that the cheese in one of the Nakajima foods is releasable from the cheese in another of the Nakajima foods.

4. **The Present Invention**

In the present invention, independent 12 recites a combination of elements directed to a laminated cheese food, including a multilayer structure produced by piling a plurality of laminated cheese foods, each of the plurality of laminated cheese foods of the multilayer structure having at least three layers, the at least three layers including:

two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled; and

an intermediate layer of platy food material, wherein the intermediate layer may be formed of a plurality of intermediate layers of platy food material which inherently bond together, the intermediate layer being disposed between and being inherently capable of bonding to the two external layers of platy food material,

wherein each of the plurality of laminated cheese foods of the multilayer structure is releasable from the adjoining ones of the plurality of laminated cheese foods of the multilayer structure.

The novel combinations of elements set forth in independent claims 12-16, can be found in the original specification, for example on pages 20-21, wherein it is disclosed that "In the external layers (A), (B), the inventor used a releasable platy food material containing cheese.....".

A copy of FIG. 7, attached in Appendix C, illustrates a multilayer structure produced from piling a plurality of laminated cheese foods t1, t2, t3, etc, each of these laminated cheese foods including external layers A, B, and intermediate layer C, the plurality of laminated cheese foods t1, t2, t3, etc. forming a pile t.

4. Shortcomings of the Rejection

Independent claim 12 recites a combination of elements directed to a laminated cheese food, including a multilayer structure produced by piling a plurality of laminated cheese foods, each of the plurality of laminated cheese foods of the multilayer structure having at least three layers, the at least three layers including:

two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled; and

an intermediate layer of platy food material, wherein the intermediate layer may be formed of a plurality of intermediate layers of platy food material which inherently bond together, the intermediate layer being disposed between and being inherently capable of bonding to the two external layers of platy food material,

wherein each of the plurality of laminated cheese foods of the multilayer structure is releasable from the adjoining ones of the plurality of laminated cheese foods of the multilayer structure.

In contrast to the present invention, in which the exterior layers A, B have inherent releasability from each other, the Mayfield disclosure is directed toward packaging sticky and amorphous food products 10 wrapped with an non-amorphous edible film 20 so that the layers 12, 14 of the food product 10 do not stick to layers 12, 14 of another food product 10.

The Appellants respectfully submit, that inasmuch as Mayfield teaches a food product that is wrapped with an edible film 20 so that it is no longer sticky, and so that it be handled easily, there can be no suggestion whatsoever that the layers 12, 14 of one Mayfield food product 10 are releasable from layers 12, 14 of another food product 10.

As found in *W.L. Gore & Associates v. Garlock, Inc.* 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), a prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. The Appellants submit that, Mayfield, in fact, teaches away from the present invention.

For example, Mayfield teaches:

In Mayfield column 3, lines 8-12: "Thus, there remains a need for preparing and packaging such sticky edible products in manners which would allow easy handling of such products and will

not permit transfer of moisture from such products to other products which come in contact with such sticky products".

In Mayfield column 3, lines 17-24: "The present invention addresses some of the above-noted problems and needs relating generally to the handling and use of sticky food products and provides methods of coating and/or covering such food products with edible, substantially non-sticky materials for use during preparation of such food products and methods for packaging such coated food products for long term storage, shipping and handling of such food products".

In Mayfield column 5, lines 55-65: "Although the sandwich-sized slice is sealed in a film, the food and film may be eaten together because the film is edible. Preferably, the film dissolves immediately when eaten and either provides no flavor or an agreeable flavor. For mass production, each sandwich-sized slice is wrapped and sealed in a non-edible plastic film to provide single-slice servings. Alternatively, a separator sheet may be placed between the sandwich-sized slices forming a stack which may be packaged in a non-edible plastic packaging or other suitable packaging".

In Mayfield column 7, lines 19-31: With reference to FIG. 2, a sandwich 40 is shown in perspective. A sandwich filler 42 is sandwiched between a first slice 44 of bread and a second slice 46 of bread. An edible film 48 encloses and seals an amorphous, semi-solid food within. The edible film 48 provides a moisture barrier around the amorphous, semi-solid food. As a moisture barrier, the edible film 48 reduces sogginess in the first and second slices of bread 44. The edible film 48 allows one to handle the amorphous, semi-solid food without contact with the amorphous, semi-solid food, which may be sticky and messy.

In Mayfield column 7, lines 38-60: "Numerous examples can be provided of foods and/or edible films according to the present invention. An example of using an edible film as a moisture

barrier is with a cheese and cracker sandwich, where the edible film provides a moisture barrier between the cheese and the crackers, preventing sogginess and/or staleness in the cracker".

Thus, while the Mayfield discloses that layers 12, 14 may contain cheese, the Appellants respectfully submit that **Mayfield document is deficient at least for a first reason** because of its failing to teach or suggest that these layers are inherently releasable from external layers of adjoining laminated cheese foods, as set forth in the present invention. The layers 12, 14 in one food product 10 of Mayfield do not adjoin the layers 12, 14 of an another food product 10 of Mayfield, because the layers 12, 14 of the one product are separated from the layers 12, 14 of all other Mayfield food products 10 by the edible film 20 wrapped around or covering the outer surfaces of each food product 10. Thus, the layers 12, 14 of one food product 10 neither adjoin nor make contact with layers 12, 14 of other food products 10. Thus, it is improper for the Examiner to conclude that layers 12, 14 in one food product would be releasable from the layers 12, 14 of another food product, since they do not come in contact with each other. Moreover, if layers 12, 14 of one food product 10 were to come in contact with layers 12, 14 of an adjoining food product, Mayfield discloses that these layers are sticky and messy, and thus would not be releasable from each other.

Further, even though Mayfield discloses that an edible film 20 of one package may be come into contact with and be releasable the edible film 20 of an adjoining package, **Mayfield is deficient at least for a second reason** because of its failure to teach or suggest that the edible films contain cheese. Mayfield explicitly discloses that the edible film is made of gelatin, petin, or agar mixed with water, and that the edible film is perfectly clear and tasteless. Thus, Mayfield fails to teach or suggest two external layers of platy food material containing cheese and having inherent releasability from external layers of adjoining laminated cheese foods. Again, with Mayfield, there is no "external layer-to-external layer" contact of layers containing cheese, and no releasability of layers

containing cheese. The external layers of Mayfield are edible films containing no cheese whatsoever, and as argued above, the layers 12, 14 which may contain cheese are not releasable from each other.

In view of the above, the Appellants conclude that the **Examiner has failed to consider the Mayfield document as a whole** when using Mayfield in combination with Mally et al. and Nakajima in rejecting the present invention as set forth in independent claim 12.

The Appellants' argument is further supported by *In re Graselli*, 713 F.2d 721, 743,218 USPQ 769,779 (Fed Cir. 1983), which found that it is improper to combine references where the reference teaches away from their combination.

Regarding the secondary references, Mally et al, and Nakajima disclose the following:

Mally et al. is directed to stuffed proteinaceous patties consisting of the following materials piled, one atop the other, from bottom to top: a lower patty 27, cheese layer 51, a condiment 59, cheese layer 52, and upper patty 58. (See column 6, lines 26-31, column 7, lines 6-12, and FIG. 3). Further, as disclosed in the Abstract, the resulting pile of materials is then "knitted together, and the filling (cheese layer 51, condiment 59, and cheese layer 52) is encapsulated therewithin".

Thus, since the Mally et al. layers 51 and layer 52 do not contact each other, and are encapsulated in the proteinaceous patty, there is no suggestion in Mally et al. that layers 51 and 52 are releasable from each other.

Nakajima (abstract) is directed to a sandwich-like food consisting of surimi in first and second continuous sheets; molten cheese mixed with minced salami which is placed on the first sheet of surimi and covered by the second sheet of surimi. The food is then pressed into a sandwich form and dried to form a dried sandwich-like product.

Thus, since the Nakajima food is directed to molten cheese mixed with minced salami which is covered on both sides by a sheet of surimi, there is no cheese-to-cheese contact. Thus, there is no suggestion in Nakajima that there is cheese-to-cheese contact. Therefore, there is no suggestion that cheese in one food is releasable from cheese in another food.

Since each of the Mally et al. and Nakajima documents fails to make up for the deficiencies of Mayfield, combining Mayfield, Mally et al. and Nakajima to reject independent claim 12 of the present invention is not proper.

Prima Facie Case of Obviousness Not Established

To establish prima facie obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. In re Royka, 180 USPQ 580 (CCPA 1974). "All words in a claim must be considered in judging the patentability of that claim against the prior art." In re Wilson, 165 USPQ 494, 496 (CCPA 1970). The combination of Mayfield in view of Mally et al. and Nakajima fails to address and meet each and every limitation set forth in claim 12.

Thus, for the reasons stated above, it is respectfully submitted that the combination of elements set forth in independent claim 12 is not disclosed or made obvious by the prior art of record, including Mayfield, Mally et al. and Nakajima.

Thus, it is believed that independent claim 12 is in condition for allowance and that dependent claims 13-16 are also allowable due to their dependence on allowable claim 12, or due to the additional novel limitations contained therein.

For example, dependent claim 16 recites a novel combination of elements directed to the laminated cheese food package according to claim 12, the package being formed by wrapping the multilayer structure produced by piling said plurality of laminated cheese foods, each of said

plurality of laminated cheese foods having said at least three layers. None of the references cited by the Examiner teaches or suggest a package formed by wrapping a multilayer structure produced by piling a plurality of laminated cheese foods, each having three or more layers, as set forth in dependent claim 16.

In view of the above arguments, all claims of the present application should be deemed allowable.

Accordingly, reversal of the Examiner's rejection based on the above arguments is respectfully requested.

IX. CONCLUSION

For the reasons advanced above, it is respectfully submitted that all claims in this application are allowable. Thus, favorable reconsideration and reversal of the Examiner's rejection of claims 12-16 under 35 U.S.C. § 103, by the Honorable Board of Patent Appeals and Interferences, are respectfully solicited.

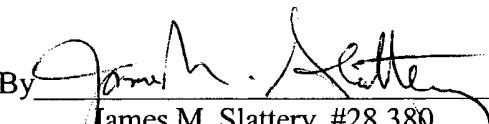
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Attorney Docket No. 4035-0116P
Art Unit: 1761
Page 16 of 20

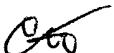
If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. § 1.16 or under 37 C.F.R. § 1.17; particularly, extension of time fees.

Respectfully submitted,

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4035-0116P

Attachments: APPENDIX A
APPENDIX B
APPENDIX C

APPENDIX A

CLAIMS ON APPEAL

1-11. (Previously withdrawn).

12. A laminated cheese food , comprising:

a multilayer structure produced by piling a plurality of laminated cheese foods, each of said plurality of laminated cheese foods of the multilayer structure having at least three layers, the at least three layers including:

two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled; and

an intermediate layer of platy food material, wherein the intermediate layer may be formed of a plurality of intermediate layers of platy food material which inherently bond together, the intermediate layer being disposed between and being inherently capable of bonding to the two external layers of platy food material,

wherein each of the plurality of laminated cheese foods of the multilayer structure is releasable from the adjoining ones of the plurality of laminated cheese foods of the multilayer structure.

13. The laminated cheese food according to Claim 12, wherein the platy food material in the intermediate layer is cheese different from the cheese contained in the platy food material in the external layers in type or colour tone, or is cheese having higher maturity, more water or fat, thus being softer, or having lower pH, than the cheese contained in the platy food materials in the external layers.

14. The laminated cheese food according to Claim 12, wherein the platy food materials in the intermediate layer contain foods other than cheese which are in a liquid, paste, powdery, solid, or fibrous state.

15. The laminated cheese food according to Claim 12, wherein:

the platy food materials in at least one of the external layers or the intermediate layer contain additives or raw materials for adjusting colour tone, and
the colour tones of the platy food materials in the external layers or the intermediate layer are the same or different.

16. A laminated cheese food package according to Claim 12, a package being formed by wrapping the multilayer structure produced by piling said plurality of laminated cheese foods, each of said plurality of laminated cheese foods having said at least three layers.

APPENDIX B

FIGURES OF THE MAYFIELD REFERENCE

The non-stick film separating the amorphous layers is shown as: element 20 in FIG 1A; element 24 in FIG 1B; and element 48 in FIG 2

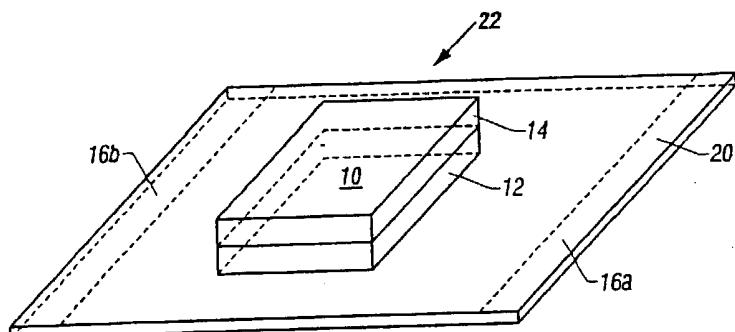


FIGURE 1A

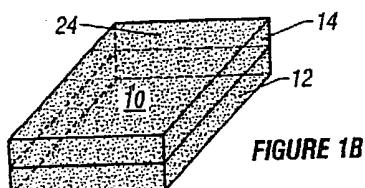


FIGURE 1B

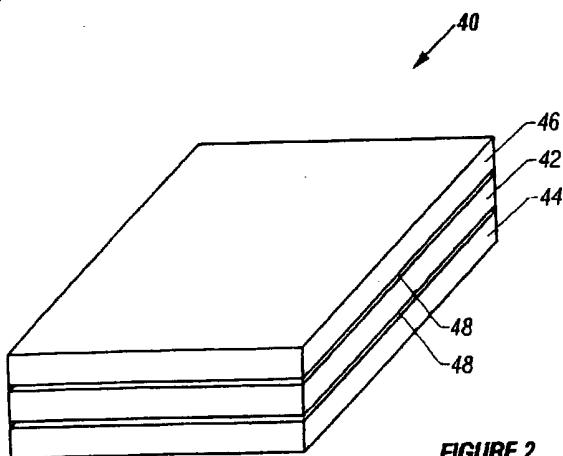
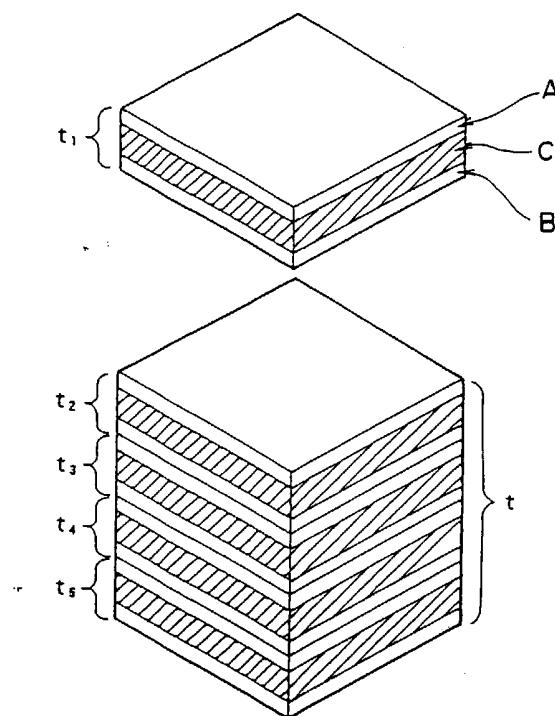


FIGURE 2

APPENDIX C

FIG. 7 OF THE PRESENT INVENTION





MS APPEAL BRIEF - PATENTS
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IN THE U. S. PATENT AND TRADEMARK OFFICE

In re application of Before the Board of Appeals
Yoshito SHIBAUCHI et al. Appeal No.:
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May 10, 2004

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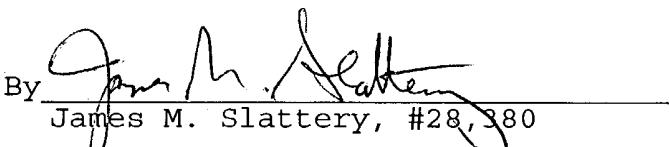
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- Please charge Deposit Account No. 02-2448 in the amount of \$0.00. A triplicate copy of this sheet is attached.

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Respectfully submitted,

BIRCH, STEWART, KOLASCH & BIRCH, LLP

By 
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Attachment(s)

(Rev. 02/08/2004)

cto
JMS:CTT/mks
4035-0116P

PATENT
4035-0116P

IN THE U.S. PATENT AND TRADEMARK OFFICE

In re application of Before the Board of Appeals
Yoshito SHIBAUCHI et al. Appeal No.
Appl. No.: 09/675,671 Group: 1761
Filed: September 29, 2000 Examiner: L. TRAN

For: METHOD FOR PRODUCING LAMINATED CHEESE AND A DEVICE THEREOF
AND LAMINATED CHEESE FOOD THEREBY PRODUCED

**SUBSTITUTE BRIEF ON APPEAL ON BEHALF OF APPELLANT
FILED UNDER PROVISIONS OF 37 C.F.R. § 1.192**

Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

May 10, 2004

Sir:

This Substitute Appeal Brief is submitted in response to the Notice of Non-Compliance dated April 30, 2004, and replaces the Appeal Brief filed on January 28, 2004 from the Final Rejection of January 29, 2003, of claims 12-16 in the above-identified application.

The Examiner is advised that Section V of the Appeal Brief is amended herein to address the issues pointed out by the Examiner in the Notice of Non-Compliance.

I. REAL PARTY IN INTEREST

As evidenced by the Assignment filed September 29, 2000, and recorded at Reel 011959, Frames 0940-0942, the Real Party In Interest in connection with the present application is the Assignee of record, Snow Brand Milk Products, Inc.

II. RELATED APPEALS AND INTERFERENCES

There are no pending Appeals or Interferences related to the present application known to Appellants or Appellants' Legal Representatives.

III. STATUS OF CLAIMS

All of claims 12-16 stand rejected.

IV. STATUS OF AMENDMENTS

An Amendment After Final Rejection was filed on January 29, 2003. In an Advisory Action mailed June 17, 2003, the Examiner stated that the Amendment filed May 27, 2003 would be entered upon filing of an Appeal Brief.

Accordingly, all Amendments filed in the present application have been entered.

V. SUMMARY OF INVENTION

The present invention relates to a Method for Producing Laminated Cheese And a Device Thereof and Laminated Cheese Food Thereby Produced.

The invention of independent claim 12 concerns a laminated cheese food, including a multilayer structure produced by piling a plurality of laminated cheese foods, each of the plurality of

laminated cheese foods of the multilayer structure having at least three layers, the at least three layers including:

two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled; and an intermediate layer of platy food material, wherein the intermediate layer may be formed of a plurality of intermediate layers of platy food material which inherently bond together, the intermediate layer being disposed between and being inherently capable of bonding to the two external layers of platy food material,

wherein each of the plurality of laminated cheese foods of the multilayer structure is releasable from the adjoining ones of the plurality of laminated cheese foods of the multilayer structure.

The invention of independent claim 13 concerns the invention of claim 12, wherein the platy food material in the intermediate layer is cheese different from the cheese contained in the platy food material in the external layers in type or colour tone, or is cheese having higher maturity, more water or fat, thus being softer, or having lower pH, than the cheese contained in the platy food materials in the external layers.

The invention of independent claim 14 concerns the invention of Claim 12, wherein the platy food materials in the intermediate layer contain foods other than cheese which are in a liquid, paste, powdery, solid, or fibrous state.

The invention of dependent Claim 15 concerns the invention of Claim 12, wherein the platy food materials in at least one of the external layers or the intermediate layer contain additives or raw

materials for adjusting colour tone, and the colour tones of the platy food materials in the external layers or the intermediate layer are the same or different.

The invention of dependent Claim 16 concerns the invention of Claim 12, a package being formed by wrapping the multilayer structure produced by piling said plurality of laminated cheese foods, each of said plurality of laminated cheese foods having said at least three layers.

The novel combination of elements set forth in each of claims 12-16, can be found in the original specification, for example, on pages 20-21, wherein it is disclosed that "In the external layers (A), (B), the inventor used a releasable platy food material containing cheese.....".

A copy of FIG. 7, attached in Appendix C, illustrates a multilayer structure produced from piling a plurality of laminated cheese foods t1, t2, t3, etc, each of these laminated cheese foods including external layers A, B, and intermediate layer C, the plurality of laminated cheese foods t1, t2, t3, etc. forming a pile t.

VI. ISSUE

The issue presented for review is whether Mayfield (U.S. 5,928,692) in view of Mally et al. (U.S. 4,832,970) and Nakajima (U.S. 4,670,276) suggest all of the elements set forth in claims 12-16 to properly support a rejection under 35 U.S.C. § 103.

VII. GROUPING OF CLAIMS

Appellants submit that claims 12-16 stand together as Group I.

VIII. ARGUMENTS

A. Group I, Independent Claim 12 and Dependent Claims 13-16

Mayfield in view of Mally et al. and Nakajima do not suggest all of the elements set forth in claims 12-16 to properly support a rejection under 35 U.S.C. § 103.

1. The Mayfield Reference

It is respectfully submitted that the combination of elements set forth in independent claim 12 is not disclosed or made obvious by the prior art of record, including Mayfield, Mally et al., and Nakajima.

In contrast to the Appellants' invention, the Mayfield document indicates that Mayfield fails to disclose a multilayer structure produced by piling a plurality of laminated cheese foods, each of said plurality of laminated cheese foods having at least three layers, each of the at least three layers, including two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of platy food materials when piled, and an intermediate layer of platy food material.

The Appellants concede that Mayfield discloses that the amorphous layers 12 and 14 of product 10 may be cheese (For example, see Mayfield column 4, line 52), but that the amorphous layers making up the food product 10 are wrapped with a non-amorphous film 20 made by mixing a gelling substance such as gelatin, pectin, or agar with water (For example, see Mayfield column 4, lines 1-4), and is perfectly clear, odorless, and tasteless (For example, see Mayfield column 4, lines 30-31).

Thus, there is no disclosure whatsoever that the amorphous layers 12, 14 of Mayfield (even if they do contain cheese) are inherently releasable. In fact, Mayfield teaches the opposite, that the

amorphous of Mayfield is sticky and messy, and as such, are not releasable. Further, as repeatedly disclosed in the Mayfield document, Mayfield teaches, that since amorphous layers (which may or may not contain cheese) are sticky and messy, that each amorphous layer is wrapped in a non-amorphous layer not containing cheese.

Examples of the Mayfield teachings include:

a. Mayfield Amorphous Layers Sticky and Messy, and Thus Are Separated From Each Other by a Non-Amorphous Edible Film:

In Mayfield column 3, lines 8-12: "Thus, there remains a need for preparing and packaging such sticky edible products in manners which would allow easy handling of such products and will not permit transfer of moisture from such products to other products which come in contact with such sticky products".

In Mayfield column 3, lines 17-24: "The present invention addresses some of the above-noted problems and needs relating generally to the handling and use of sticky food products and provides methods of coating and/or covering such food products with edible, substantially non-sticky materials for use during preparation of such food products and methods for packaging such coated food products for long term storage, shipping and handling of such food products".

In Mayfield column 5, lines 55-65: "Although the sandwich-sized slice is sealed in a film, the food and film may be eaten together because the film is edible. Preferably, the film dissolves immediately when eaten and either provides no flavor or an agreeable flavor. For mass production, each sandwich-sized slice is wrapped and sealed in a non-edible plastic film to provide single-slice servings. Alternatively, a separator sheet may be placed between the sandwich-sized slices forming a stack which may be packaged in a non-edible plastic packaging or other suitable packaging".

In Mayfield column 7, lines 19-31: With reference to FIG. 2, a sandwich 40 is shown in perspective. A sandwich filler 42 is sandwiched between a first slice 44 of bread and a second slice 46 of bread. An edible film 48 encloses and seals an amorphous, semi-solid food within. The edible film 48 provides a moisture barrier around the amorphous, semi-solid food. As a moisture barrier, the edible film 48 reduces sogginess in the first and second slices of bread 44. The edible film 48 allows one to handle the amorphous, semi-solid food without contact with the amorphous, semi-solid food, which may be sticky and messy.

In Mayfield column 7, lines 38-60: "Numerous examples can be provided of foods and/or edible films according to the present invention. An example of using an edible film as a moisture barrier is with a cheese and cracker sandwich, where the edible film provides a moisture barrier between the cheese and the crackers, preventing sogginess and/or staleness in the cracker".

b. The Mayfield Edible Non-Amorphous Film, Which Separates the Amorphous Layers, Does Not Contain Cheese:

In Mayfield column 4, lines 1-4, "a non-amorphous film 20 made by mixing a gelling substance such as gelatin, pectin, or agar with water", and

In Mayfield column 4, lines 30-31, "is perfectly clear, odorless, and tasteless".

2. The Mally et al. Reference

Mally et al. is directed to stuffed proteinaceous patties including the following materials piled, one atop the other, from bottom to top: a lower patty 27, cheese layer 51, a condiment 59, cheese layer 52, and an upper patty 58. (See column 6, lines 26-31, column 7, lines 6-12, and FIG. 3). Further, as disclosed in the Abstract, the resulting pile of materials is then "knitted together, and the filling (cheese layer 51, condiment 59, and cheese layer 52) is encapsulated therewithin".

Thus, since the Mally et al. layers 51 and layer 52 do not contact each other because of the condiment which separates them, and since the resulting filling is then knitted together and encapsulated in the proteinaceous patty, there is no possibility in Mally et al. that layers 51 and 52 are releasable from each other.

3. The Nakajima Reference

Nakajima (abstract) is directed to a sandwich-like food including surimi in first and second continuous sheets; and molten cheese mixed with minced salami, which is placed on the first sheet of surimi and covered by the second sheet of surimi. The food is then pressed into a sandwich form and dried to form a dried sandwich-like product.

Since the Nakajima food is directed to molten cheese mixed with minced salami which is covered on both sides by a sheet of surimi, there is no cheese-to-cheese contact. Moreover, since there is no suggestion in Nakajima that there is cheese-to-cheese contact, there can be no suggestion that the cheese in one of the Nakajima foods is releasable from the cheese in another of the Nakajima foods.

4. The Present Invention

In the present invention, independent 12 recites a combination of elements directed to a laminated cheese food, including a multilayer structure produced by piling a plurality of laminated cheese foods, each of the plurality of laminated cheese foods of the multilayer structure having at least three layers, the at least three layers including:

two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled; and

an intermediate layer of platy food material, wherein the intermediate layer may be formed of a plurality of intermediate layers of platy food material which inherently bond together, the intermediate layer being disposed between and being inherently capable of bonding to the two external layers of platy food material,

wherein each of the plurality of laminated cheese foods of the multilayer structure is releasable from the adjoining ones of the plurality of laminated cheese foods of the multilayer structure.

The novel combinations of elements set forth in independent claims 12-16, can be found in the original specification, for example on pages 20-21, wherein it is disclosed that “In the external layers (A), (B), the inventor used a releasable platy food material containing cheese.....”.

A copy of FIG. 7, attached in Appendix C, illustrates a multilayer structure produced from piling a plurality of laminated cheese foods t1, t2, t3, etc, each of these laminated cheese foods including external layers A, B, and intermediate layer C, the plurality of laminated cheese foods t1, t2, t3, etc. forming a pile t.

4. Shortcomings of the Rejection

Independent claim 12 recites a combination of elements directed to a laminated cheese food, including a multilayer structure produced by piling a plurality of laminated cheese foods, each of the plurality of laminated cheese foods of the multilayer structure having at least three layers, the at least three layers including:

two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled; and

an intermediate layer of platy food material, wherein the intermediate layer may be formed of a plurality of intermediate layers of platy food material which inherently bond together, the intermediate layer being disposed between and being inherently capable of bonding to the two external layers of platy food material,

wherein each of the plurality of laminated cheese foods of the multilayer structure is releasable from the adjoining ones of the plurality of laminated cheese foods of the multilayer structure.

In contrast to the present invention, in which the exterior layers A, B have inherent releasability from each other, the Mayfield disclosure is directed toward packaging sticky and amorphous food products 10 wrapped with an non-amorphous edible film 20 so that the layers 12, 14 of the food product 10 do not stick to layers 12, 14 of another food product 10.

The Appellants respectfully submit, that inasmuch as Mayfield teaches a food product that is wrapped with an edible film 20 so that it is no longer sticky, and so that it be handled easily, there can be no suggestion whatsoever that the layers 12, 14 of one Mayfield food product 10 are releasable from layers 12, 14 of another food product 10.

As found in *W.L. Gore & Associates v. Garlock, Inc.* 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), a prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. The Appellants submit that, Mayfield, in fact, teaches away from the present invention.

For example, Mayfield teaches:

In Mayfield column 3, lines 8-12: "Thus, there remains a need for preparing and packaging such sticky edible products in manners which would allow easy handling of such products and will

not permit transfer of moisture from such products to other products which come in contact with such sticky products”.

In Mayfield column 3, lines 17-24: “The present invention addresses some of the above-noted problems and needs relating generally to the handling and use of sticky food products and provides methods of coating and/or covering such food products with edible, substantially non-sticky materials for use during preparation of such food products and methods for packaging such coated food products for long term storage, shipping and handling of such food products”.

In Mayfield column 5, lines 55-65: “Although the sandwich-sized slice is sealed in a film, the food and film may be eaten together because the film is edible. Preferably, the film dissolves immediately when eaten and either provides no flavor or an agreeable flavor. For mass production, each sandwich-sized slice is wrapped and sealed in a non-edible plastic film to provide single-slice servings. Alternatively, a separator sheet may be placed between the sandwich-sized slices forming a stack which may be packaged in a non-edible plastic packaging or other suitable packaging”.

In Mayfield column 7, lines 19-31: With reference to FIG. 2, a sandwich 40 is shown in perspective. A sandwich filler 42 is sandwiched between a first slice 44 of bread and a second slice 46 of bread. An edible film 48 encloses and seals an amorphous, semi-solid food within. The edible film 48 provides a moisture barrier around the amorphous, semi-solid food. As a moisture barrier, the edible film 48 reduces sogginess in the first and second slices of bread 44. The edible film 48 allows one to handle the amorphous, semi-solid food without contact with the amorphous, semi-solid food, which may be sticky and messy.

In Mayfield column 7, lines 38-60: “Numerous examples can be provided of foods and/or edible films according to the present invention. An example of using an edible film as a moisture

barrier is with a cheese and cracker sandwich, where the edible film provides a moisture barrier between the cheese and the crackers, preventing sogginess and/or staleness in the cracker".

Thus, while the Mayfield discloses that layers 12, 14 may contain cheese, the Appellants respectfully submit that **Mayfield document is deficient at least for a first reason** because of its failing to teach or suggest that these layers are inherently releasable from external layers of adjoining laminated cheese foods, as set forth in the present invention. The layers 12, 14 in one food product 10 of Mayfield do not adjoin the layers 12, 14 of an another food product 10 of Mayfield, because the layers 12, 14 of the one product are separated from the layers 12, 14 of all other Mayfield food products 10 by the edible film 20 wrapped around or covering the outer surfaces of each food product 10. Thus, the layers 12, 14 of one food product 10 neither adjoin nor make contact with layers 12, 14 of other food products 10. Thus, it is improper for the Examiner to conclude that layers 12, 14 in one food product would be releasable from the layers 12, 14 of another food product, since they do not come in contact with each other. Moreover, if layers 12, 14 of one food product 10 were to come in contact with layers 12, 14 of an adjoining food product, Mayfield discloses that these layers are sticky and messy, and thus would not be releasable from each other.

Further, even though Mayfield discloses that an edible film 20 of one package may be come into contact with and be releasable the edible film 20 of an adjoining package, **Mayfield is deficient at least for a second reason** because of its failure to teach or suggest that the edible films contain cheese. Mayfield explicitly discloses that the edible film is made of gelatin, petin, or agar mixed with water, and that the edible film is perfectly clear and tasteless. Thus, Mayfield fails to teach or suggest two external layers of platy food material containing cheese and having inherent releasability from external layers of adjoining laminated cheese foods. Again, with Mayfield, there is no "external layer-to-external layer" contact of layers containing cheese, and no releasability of layers

containing cheese. The external layers of Mayfield are edible films containing no cheese whatsoever, and as argued above, the layers 12, 14 which may contain cheese are not releasable from each other.

In view of the above, the Appellants conclude that the **Examiner has failed to consider the Mayfield document as a whole** when using Mayfield in combination with Mally et al. and Nakajima in rejecting the present invention as set forth in independent claim 12.

The Appellants' argument is further supported by *In re Graselli*, 713 F.2d 721, 743,218 USPQ 769,779 (Fed Cir. 1983), which found that it is improper to combine references where the reference teaches away from their combination.

Regarding the secondary references, Mally et al, and Nakajima disclose the following:

Mally et al. is directed to stuffed proteinaceous patties consisting of the following materials piled, one atop the other, from bottom to top: a lower patty 27, cheese layer 51, a condiment 59, cheese layer 52, and upper patty 58. (See column 6, lines 26-31, column 7, lines 6-12, and FIG. 3). Further, as disclosed in the Abstract, the resulting pile of materials is then "knitted together, and the filling (cheese layer 51, condiment 59, and cheese layer 52) is encapsulated therewithin".

Thus, since the Mally et al. layers 51 and layer 52 do not contact each other, and are encapsulated in the proteinaceous patty, there is no suggestion in Mally et al. that layers 51 and 52 are releasable from each other.

Nakajima (abstract) is directed to a sandwich-like food consisting of surimi in first and second continuous sheets; molten cheese mixed with minced salami which is placed on the first sheet of surimi and covered by the second sheet of surimi. The food is then pressed into a sandwich form and dried to form a dried sandwich-like product.

Thus, since the Nakajima food is directed to molten cheese mixed with minced salami which is covered on both sides by a sheet of surimi, there is no cheese-to-cheese contact. Thus, there is no suggestion in Nakajima that there is cheese-to-cheese contact. Therefore, there is no suggestion that cheese in one food is releasable from cheese in another food.

Since each of the Mally et al. and Nakajima documents fails to make up for the deficiencies of Mayfield, combining Mayfield, Mally et al. and Nakajima to reject independent claim 12 of the present invention is not proper.

Prima Facie Case of Obviousness Not Established

To establish prima facie obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. In re Royka, 180 USPQ 580 (CCPA 1974). "All words in a claim must be considered in judging the patentability of that claim against the prior art." In re Wilson, 165 USPQ 494, 496 (CCPA 1970). The combination of Mayfield in view of Mally et al. and Nakajima fails to address and meet each and every limitation set forth in claim 12.

Thus, for the reasons stated above, it is respectfully submitted that the combination of elements set forth in independent claim 12 is not disclosed or made obvious by the prior art of record, including Mayfield, Mally et al. and Nakajima.

Thus, it is believed that independent claim 12 is in condition for allowance and that dependent claims 13-16 are also allowable due to their dependence on allowable claim 12, or due to the additional novel limitations contained therein.

For example, dependent claim 16 recites a novel combination of elements directed to the laminated cheese food package according to claim 12, the package being formed by wrapping the multilayer structure produced by piling said plurality of laminated cheese foods, each of said

plurality of laminated cheese foods having said at least three layers. None of the references cited by the Examiner teaches or suggest a package formed by wrapping a multilayer structure produced by piling a plurality of laminated cheese foods, each having three or more layers, as set forth in dependent claim 16.

In view of the above arguments, all claims of the present application should be deemed allowable.

Accordingly, reversal of the Examiner's rejection based on the above arguments is respectfully requested.

IX. CONCLUSION

For the reasons advanced above, it is respectfully submitted that all claims in this application are allowable. Thus, favorable reconsideration and reversal of the Examiner's rejection of claims 12-16 under 35 U.S.C. § 103, by the Honorable Board of Patent Appeals and Interferences, are respectfully solicited.

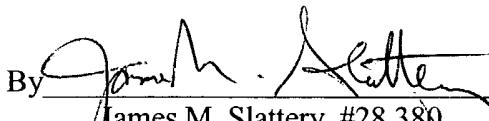
Appl. No. 09/675,671
Substitute Appeal Brief dated May 10, 2004
In connection with Notice of Appeal filed June 30, 2003

Attorney Docket No. 4035-0116P
Art Unit: 1761
Page 16 of 20

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. § 1.16 or under 37 C.F.R. § 1.17; particularly, extension of time fees.

Respectfully submitted,

BIRCH, STEWART, KOLASCH & BIRCH, LLP

By 
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Carl T. Thomsen, #50,786


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Attachments: APPENDIX A
APPENDIX B
APPENDIX C

APPENDIX A

CLAIMS ON APPEAL

1-11. (Previously withdrawn).

12. A laminated cheese food , comprising:

a multilayer structure produced by piling a plurality of laminated cheese foods, each of said plurality of laminated cheese foods of the multilayer structure having at least three layers, the at least three layers including:

two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled; and

an intermediate layer of platy food material, wherein the intermediate layer may be formed of a plurality of intermediate layers of platy food material which inherently bond together, the intermediate layer being disposed between and being inherently capable of bonding to the two external layers of platy food material,

wherein each of the plurality of laminated cheese foods of the multilayer structure is releasable from the adjoining ones of the plurality of laminated cheese foods of the multilayer structure.

13. The laminated cheese food according to Claim 12, wherein the platy food material in the intermediate layer is cheese different from the cheese contained in the platy food material in the external layers in type or colour tone, or is cheese having higher maturity, more water or fat, thus being softer, or having lower pH, than the cheese contained in the platy food materials in the external layers.

14. The laminated cheese food according to Claim 12, wherein the platy food materials in the intermediate layer contain foods other than cheese which are in a liquid, paste, powdery, solid, or fibrous state.

15. The laminated cheese food according to Claim 12, wherein:

the platy food materials in at least one of the external layers or the intermediate layer contain additives or raw materials for adjusting colour tone, and

the colour tones of the platy food materials in the external layers or the intermediate layer are the same or different.

16. A laminated cheese food package according to Claim 12, a package being formed by wrapping the multilayer structure produced by piling said plurality of laminated cheese foods, each of said plurality of laminated cheese foods having said at least three layers.

APPENDIX B

FIGURES OF THE MAYFIELD REFERENCE

The non-stick film separating the amorphous layers is shown as: element 20 in FIG 1A; element 24 in FIG 1B; and element 48 in FIG 2

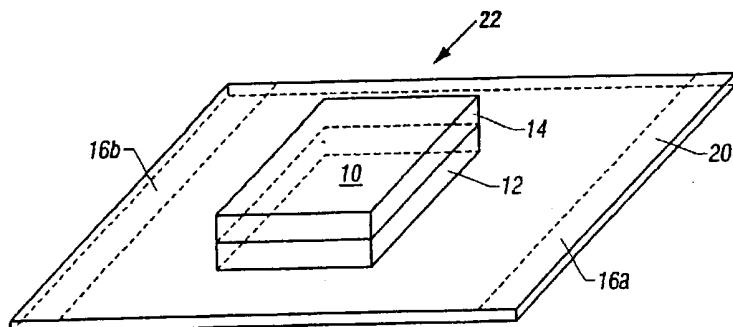


FIGURE 1A

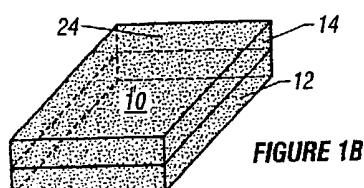


FIGURE 1B

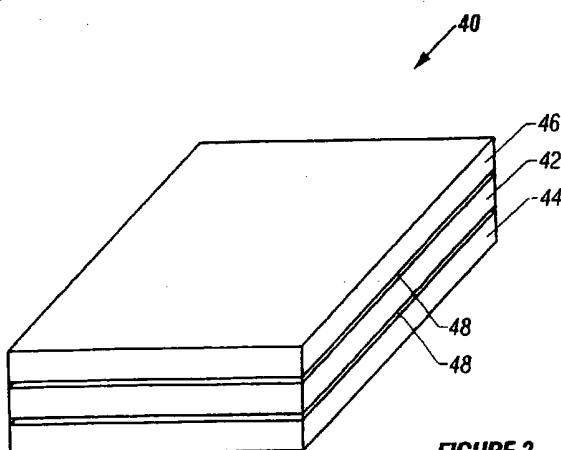
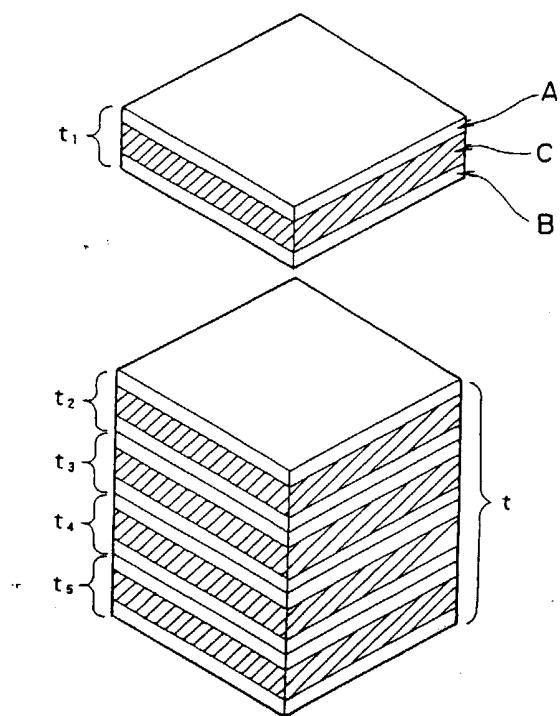


FIGURE 2

APPENDIX C

FIG. 7 OF THE PRESENT INVENTION





MS APPEAL BRIEF - PATENTS
PATENT
4035-0116P

IN THE U.S. PATENT AND TRADEMARK OFFICE

In re application of Before the Board of Appeals
Yoshito SHIBAUCHI et al. Appeal No.:
Appl. No.: 09/674,671 Group: 1761
Filed: September 20, 2000 Examiner: L. TRAN
Conf.: 3850
For: METHOD FOR PRODUCING LAMINATED CHEESE
AND A DEVICE THEREOF AND LAMINATED
CHEESE FOOD THEREBY PRODUCED

SUBSTITUTE APPEAL BRIEF TRANSMITTAL FORM

MS APPEAL BRIEF - PATENTS
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

May 10, 2004

Sir:

Transmitted herewith is a Substitute Appeal Brief (in triplicate) on behalf of the Appellants in connection with the above-identified application.

The enclosed document is being transmitted via the
Certificate of Mailing provisions of 37 C.F.R. § 1.8.

A Notice of Appeal was filed on June 30, 2003.

Applicant claims small entity status in accordance with 37 C.F.R. § 1.27

The fee has been calculated as shown below:

- Extension of time fee pursuant to 37 C.F.R. §§ 1.17 and 1.136(a) - \$530.00 (paid on January 28, 2004).
- Fee for filing an Appeal Brief - \$330.00 (large entity) (paid on January 28, 2004).

- Check(s) in the amount of \$860.00 submitted on January 28, 2004.
- Please charge Deposit Account No. 02-2448 in the amount of \$0.00. A triplicate copy of this sheet is attached.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. §§ 1.16 or 1.17; particularly, extension of time fees.

Respectfully submitted,

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4035-0116P

Attachment(s)

(Rev. 02/08/2004)

PATENT
4035-0116P

IN THE U.S. PATENT AND TRADEMARK OFFICE

In re application of Before the Board of Appeals

Yoshito SHIBAUCHI et al. Appeal No.

Appl. No.: 09/675,671 Group: 1761

Filed: September 29, 2000 Examiner: L. TRAN

For: METHOD FOR PRODUCING LAMINATED CHEESE AND A DEVICE THEREOF
AND LAMINATED CHEESE FOOD THEREBY PRODUCED

SUBSTITUTE BRIEF ON APPEAL ON BEHALF OF APPELLANT
FILED UNDER PROVISIONS OF 37 C.F.R. § 1.192

Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

May 10, 2004

Sir:

This Substitute Appeal Brief is submitted in response to the Notice of Non-Compliance dated April 30, 2004, and replaces the Appeal Brief filed on January 28, 2004 from the Final Rejection of January 29, 2003, of claims 12-16 in the above-identified application.

The Examiner is advised that Section V of the Appeal Brief is amended herein to address the issues pointed out by the Examiner in the Notice of Non-Compliance.

I. REAL PARTY IN INTEREST

As evidenced by the Assignment filed September 29, 2000, and recorded at Reel 011959, Frames 0940-0942, the Real Party In Interest in connection with the present application is the Assignee of record, Snow Brand Milk Products, Inc.

II. RELATED APPEALS AND INTERFERENCES

There are no pending Appeals or Interferences related to the present application known to Appellants or Appellants' Legal Representatives.

III. STATUS OF CLAIMS

All of claims 12-16 stand rejected.

IV. STATUS OF AMENDMENTS

An Amendment After Final Rejection was filed on January 29, 2003. In an Advisory Action mailed June 17, 2003, the Examiner stated that the Amendment filed May 27, 2003 would be entered upon filing of an Appeal Brief.

Accordingly, all Amendments filed in the present application have been entered.

V. SUMMARY OF INVENTION

The present invention relates to a Method for Producing Laminated Cheese And a Device Thereof and Laminated Cheese Food Thereby Produced.

The invention of independent claim 12 concerns a laminated cheese food, including a multilayer structure produced by piling a plurality of laminated cheese foods, each of the plurality of

laminated cheese foods of the multilayer structure having at least three layers, the at least three layers including:

two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled; and
an intermediate layer of platy food material, wherein the intermediate layer may be formed of a plurality of intermediate layers of platy food material which inherently bond together, the intermediate layer being disposed between and being inherently capable of bonding to the two external layers of platy food material,

wherein each of the plurality of laminated cheese foods of the multilayer structure is releasable from the adjoining ones of the plurality of laminated cheese foods of the multilayer structure.

The invention of independent claim 13 concerns the invention of claim 12, wherein the platy food material in the intermediate layer is cheese different from the cheese contained in the platy food material in the external layers in type or colour tone, or is cheese having higher maturity, more water or fat, thus being softer, or having lower pH, than the cheese contained in the platy food materials in the external layers.

The invention of independent claim 14 concerns the invention of Claim 12, wherein the platy food materials in the intermediate layer contain foods other than cheese which are in a liquid, paste, powdery, solid, or fibrous state.

The invention of dependent Claim 15 concerns the invention of Claim 12, wherein the platy food materials in at least one of the external layers or the intermediate layer contain additives or raw

materials for adjusting colour tone, and the colour tones of the platy food materials in the external layers or the intermediate layer are the same or different.

The invention of dependent Claim 16 concerns the invention of Claim 12, a package being formed by wrapping the multilayer structure produced by piling said plurality of laminated cheese foods, each of said plurality of laminated cheese foods having said at least three layers.

The novel combination of elements set forth in each of claims 12-16, can be found in the original specification, for example, on pages 20-21, wherein it is disclosed that "In the external layers (A), (B), the inventor used a releasable platy food material containing cheese.....".

A copy of FIG. 7, attached in Appendix C, illustrates a multilayer structure produced from piling a plurality of laminated cheese foods t1, t2, t3, etc, each of these laminated cheese foods including external layers A, B, and intermediate layer C, the plurality of laminated cheese foods t1, t2, t3, etc. forming a pile t.

VI. ISSUE

The issue presented for review is whether Mayfield (U.S. 5,928,692) in view of Mally et al. (U.S. 4,832,970) and Nakajima (U.S. 4,670,276) suggest all of the elements set forth in claims 12-16 to properly support a rejection under 35 U.S.C. § 103.

VII. GROUPING OF CLAIMS

Appellants submit that claims 12-16 stand together as Group I.

VIII. ARGUMENTS

A. Group I, Independent Claim 12 and Dependent Claims 13-16

Mayfield in view of Mally et al. and Nakajima do not suggest all of the elements set forth in claims 12-16 to properly support a rejection under 35 U.S.C. § 103.

1. The Mayfield Reference

It is respectfully submitted that the combination of elements set forth in independent claim 12 is not disclosed or made obvious by the prior art of record, including Mayfield, Mally et al., and Nakajima.

In contrast to the Appellants' invention, the Mayfield document indicates that Mayfield fails to disclose a multilayer structure produced by piling a plurality of laminated cheese foods, each of said plurality of laminated cheese foods having at least three layers, each of the at least three layers, including two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of platy food materials when piled, and an intermediate layer of platy food material.

The Appellants concede that Mayfield discloses that the amorphous layers 12 and 14 of product 10 may be cheese (For example, see Mayfield column 4, line 52), but that the amorphous layers making up the food product 10 are wrapped with a non-amorphous film 20 made by mixing a gelling substance such as gelatin, pectin, or agar with water (For example, see Mayfield column 4, lines 1-4), and is perfectly clear, odorless, and tasteless (For example, see Mayfield column 4, lines 30-31).

Thus, there is no disclosure whatsoever that the amorphous layers 12, 14 of Mayfield (even if they do contain cheese) are inherently releasable. In fact, Mayfield teaches the opposite, that the

amorphous of Mayfield is sticky and messy, and as such, are not releasable. Further, as repeatedly disclosed in the Mayfield document, Mayfield teaches, that since amorphous layers (which may or may not contain cheese) are sticky and messy, that each amorphous layer is wrapped in a non-amorphous layer not containing cheese.

Examples of the Mayfield teachings include:

a. Mayfield Amorphous Layers Sticky and Messy, and Thus Are Separated From Each Other by a Non-Amorphous Edible Film:

In Mayfield column 3, lines 8-12: "Thus, there remains a need for preparing and packaging such sticky edible products in manners which would allow easy handling of such products and will not permit transfer of moisture from such products to other products which come in contact with such sticky products".

In Mayfield column 3, lines 17-24: "The present invention addresses some of the above-noted problems and needs relating generally to the handling and use of sticky food products and provides methods of coating and/or covering such food products with edible, substantially non-sticky materials for use during preparation of such food products and methods for packaging such coated food products for long term storage, shipping and handling of such food products".

In Mayfield column 5, lines 55-65: "Although the sandwich-sized slice is sealed in a film, the food and film may be eaten together because the film is edible. Preferably, the film dissolves immediately when eaten and either provides no flavor or an agreeable flavor. For mass production, each sandwich-sized slice is wrapped and sealed in a non-edible plastic film to provide single-slice servings. Alternatively, a separator sheet may be placed between the sandwich-sized slices forming a stack which may be packaged in a non-edible plastic packaging or other suitable packaging".

In Mayfield column 7, lines 19-31: With reference to FIG. 2, a sandwich 40 is shown in perspective. A sandwich filler 42 is sandwiched between a first slice 44 of bread and a second slice 46 of bread. An edible film 48 encloses and seals an amorphous, semi-solid food within. The edible film 48 provides a moisture barrier around the amorphous, semi-solid food. As a moisture barrier, the edible film 48 reduces sogginess in the first and second slices of bread 44. The edible film 48 allows one to handle the amorphous, semi-solid food without contact with the amorphous, semi-solid food, which may be sticky and messy.

In Mayfield column 7, lines 38-60: "Numerous examples can be provided of foods and/or edible films according to the present invention. An example of using an edible film as a moisture barrier is with a cheese and cracker sandwich, where the edible film provides a moisture barrier between the cheese and the crackers, preventing sogginess and/or staleness in the cracker".

b. The Mayfield Edible Non-Amorphous Film, Which Separates the Amorphous Layers, Does Not Contain Cheese:

In Mayfield column 4, lines 1-4, "a non-amorphous film 20 made by mixing a gelling substance such as gelatin, pectin, or agar with water", and

In Mayfield column 4, lines 30-31, "is perfectly clear, odorless, and tasteless".

2. The Mally et al. Reference

Mally et al. is directed to stuffed proteinaceous patties including the following materials piled, one atop the other, from bottom to top: a lower patty 27, cheese layer 51, a condiment 59, cheese layer 52, and an upper patty 58. (See column 6, lines 26-31, column 7, lines 6-12, and FIG. 3). Further, as disclosed in the Abstract, the resulting pile of materials is then "knitted together, and the filling (cheese layer 51, condiment 59, and cheese layer 52) is encapsulated therewithin".

Thus, since the Mally et al. layers 51 and layer 52 do not contact each other because of the condiment which separates them, and since the resulting filling is then knitted together and encapsulated in the proteinaceous patty, there is no possibility in Mally et al. that layers 51 and 52 are releasable from each other.

3. The Nakajima Reference

Nakajima (abstract) is directed to a sandwich-like food including surimi in first and second continuous sheets; and molten cheese mixed with minced salami, which is placed on the first sheet of surimi and covered by the second sheet of surimi. The food is then pressed into a sandwich form and dried to form a dried sandwich-like product.

Since the Nakajima food is directed to molten cheese mixed with minced salami which is covered on both sides by a sheet of surimi, there is no cheese-to-cheese contact. Moreover, since there is no suggestion in Nakajima that there is cheese-to-cheese contact, there can be no suggestion that the cheese in one of the Nakajima foods is releasable from the cheese in another of the Nakajima foods.

4. The Present Invention

In the present invention, independent 12 recites a combination of elements directed to a laminated cheese food, including a multilayer structure produced by piling a plurality of laminated cheese foods, each of the plurality of laminated cheese foods of the multilayer structure having at least three layers, the at least three layers including:

two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled; and

an intermediate layer of platy food material, wherein the intermediate layer may be formed of a plurality of intermediate layers of platy food material which inherently bond together, the intermediate layer being disposed between and being inherently capable of bonding to the two external layers of platy food material,

wherein each of the plurality of laminated cheese foods of the multilayer structure is releasable from the adjoining ones of the plurality of laminated cheese foods of the multilayer structure.

The novel combinations of elements set forth in independent claims 12-16, can be found in the original specification, for example on pages 20-21, wherein it is disclosed that "In the external layers (A), (B), the inventor used a releasable platy food material containing cheese.....".

A copy of FIG. 7, attached in Appendix C, illustrates a multilayer structure produced from piling a plurality of laminated cheese foods t1, t2, t3, etc, each of these laminated cheese foods including external layers A, B, and intermediate layer C, the plurality of laminated cheese foods t1, t2, t3, etc. forming a pile t.

4. Shortcomings of the Rejection

Independent claim 12 recites a combination of elements directed to a laminated cheese food, including a multilayer structure produced by piling a plurality of laminated cheese foods, each of the plurality of laminated cheese foods of the multilayer structure having at least three layers, the at least three layers including:

two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled; and

an intermediate layer of platy food material, wherein the intermediate layer may be formed of a plurality of intermediate layers of platy food material which inherently bond together, the intermediate layer being disposed between and being inherently capable of bonding to the two external layers of platy food material,

wherein each of the plurality of laminated cheese foods of the multilayer structure is releasable from the adjoining ones of the plurality of laminated cheese foods of the multilayer structure.

In contrast to the present invention, in which the exterior layers A, B have inherent releasability from each other, the Mayfield disclosure is directed toward packaging sticky and amorphous food products 10 wrapped with an non-amorphous edible film 20 so that the layers 12, 14 of the food product 10 do not stick to layers 12, 14 of another food product 10.

The Appellants respectfully submit, that inasmuch as Mayfield teaches a food product that is wrapped with an edible film 20 so that it is no longer sticky, and so that it be handled easily, there can be no suggestion whatsoever that the layers 12, 14 of one Mayfield food product 10 are releasable from layers 12, 14 of another food product 10.

As found in *W.L. Gore & Associates v. Garlock, Inc.* 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), a prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. The Appellants submit that, Mayfield, in fact, teaches away from the present invention.

For example, Mayfield teaches:

In Mayfield column 3, lines 8-12: "Thus, there remains a need for preparing and packaging such sticky edible products in manners which would allow easy handling of such products and will

not permit transfer of moisture from such products to other products which come in contact with such sticky products".

In Mayfield column 3, lines 17-24: "The present invention addresses some of the above-noted problems and needs relating generally to the handling and use of sticky food products and provides methods of coating and/or covering such food products with edible, substantially non-sticky materials for use during preparation of such food products and methods for packaging such coated food products for long term storage, shipping and handling of such food products".

In Mayfield column 5, lines 55-65: "Although the sandwich-sized slice is sealed in a film, the food and film may be eaten together because the film is edible. Preferably, the film dissolves immediately when eaten and either provides no flavor or an agreeable flavor. For mass production, each sandwich-sized slice is wrapped and sealed in a non-edible plastic film to provide single-slice servings. Alternatively, a separator sheet may be placed between the sandwich-sized slices forming a stack which may be packaged in a non-edible plastic packaging or other suitable packaging".

In Mayfield column 7, lines 19-31: With reference to FIG. 2, a sandwich 40 is shown in perspective. A sandwich filler 42 is sandwiched between a first slice 44 of bread and a second slice 46 of bread. An edible film 48 encloses and seals an amorphous, semi-solid food within. The edible film 48 provides a moisture barrier around the amorphous, semi-solid food. As a moisture barrier, the edible film 48 reduces sogginess in the first and second slices of bread 44. The edible film 48 allows one to handle the amorphous, semi-solid food without contact with the amorphous, semi-solid food, which may be sticky and messy.

In Mayfield column 7, lines 38-60: "Numerous examples can be provided of foods and/or edible films according to the present invention. An example of using an edible film as a moisture

barrier is with a cheese and cracker sandwich, where the edible film provides a moisture barrier between the cheese and the crackers, preventing sogginess and/or staleness in the cracker".

Thus, while the Mayfield discloses that layers 12, 14 may contain cheese, the Appellants respectfully submit that **Mayfield document is deficient at least for a first reason** because of its failing to teach or suggest that these layers are inherently releasable from external layers of adjoining laminated cheese foods, as set forth in the present invention. The layers 12, 14 in one food product 10 of Mayfield do not adjoin the layers 12, 14 of an another food product 10 of Mayfield, because the layers 12, 14 of the one product are separated from the layers 12, 14 of all other Mayfield food products 10 by the edible film 20 wrapped around or covering the outer surfaces of each food product 10. Thus, the layers 12, 14 of one food product 10 neither adjoin nor make contact with layers 12, 14 of other food products 10. Thus, it is improper for the Examiner to conclude that layers 12, 14 in one food product would be releasable from the layers 12, 14 of another food product, since they do not come in contact with each other. Moreover, if layers 12, 14 of one food product 10 were to come in contact with layers 12, 14 of an adjoining food product, Mayfield discloses that these layers are sticky and messy, and thus would not be releasable from each other.

Further, even though Mayfield discloses that an edible film 20 of one package may be come into contact with and be releasable the edible film 20 of an adjoining package, **Mayfield is deficient at least for a second reason** because of its failure to teach or suggest that the edible films contain cheese. Mayfield explicitly discloses that the edible film is made of gelatin, petin, or agar mixed with water, and that the edible film is perfectly clear and tasteless. Thus, Mayfield fails to teach or suggest two external layers of platy food material containing cheese and having inherent releasability from external layers of adjoining laminated cheese foods. Again, with Mayfield, there is no "external layer-to-external layer" contact of layers containing cheese, and no releasability of layers

containing cheese. The external layers of Mayfield are edible films containing no cheese whatsoever, and as argued above, the layers 12, 14 which may contain cheese are not releasable from each other.

In view of the above, the Appellants conclude that the **Examiner has failed to consider the Mayfield document as a whole** when using Mayfield in combination with Mally et al. and Nakajima in rejecting the present invention as set forth in independent claim 12.

The Appellants' argument is further supported by *In re Graselli*, 713 F.2d 721, 743,218 USPQ 769,779 (Fed Cir. 1983), which found that it is improper to combine references where the reference teaches away from their combination.

Regarding the secondary references, Mally et al, and Nakajima disclose the following:

Mally et al. is directed to stuffed proteinaceous patties consisting of the following materials piled, one atop the other, from bottom to top: a lower patty 27, cheese layer 51, a condiment 59, cheese layer 52, and upper patty 58. (See column 6, lines 26-31, column 7, lines 6-12, and FIG. 3). Further, as disclosed in the Abstract, the resulting pile of materials is then "knitted together, and the filling (cheese layer 51, condiment 59, and cheese layer 52) is encapsulated therewithin".

Thus, since the Mally et al. layers 51 and layer 52 do not contact each other, and are encapsulated in the proteinaceous patty, there is no suggestion in Mally et al. that layers 51 and 52 are releasable from each other.

Nakajima (abstract) is directed to a sandwich-like food consisting of surimi in first and second continuous sheets; molten cheese mixed with minced salami which is placed on the first sheet of surimi and covered by the second sheet of surimi. The food is then pressed into a sandwich form and dried to form a dried sandwich-like product.

Thus, since the Nakajima food is directed to molten cheese mixed with minced salami which is covered on both sides by a sheet of surimi, there is no cheese-to-cheese contact. Thus, there is no suggestion in Nakajima that there is cheese-to-cheese contact. Therefore, there is no suggestion that cheese in one food is releasable from cheese in another food.

Since each of the Mally et al. and Nakajima documents fails to make up for the deficiencies of Mayfield, combining Mayfield, Mally et al. and Nakajima to reject independent claim 12 of the present invention is not proper.

Prima Facie Case of Obviousness Not Established

To establish prima facie obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. In re Royka, 180 USPQ 580 (CCPA 1974). "All words in a claim must be considered in judging the patentability of that claim against the prior art." In re Wilson, 165 USPQ 494, 496 (CCPA 1970). The combination of Mayfield in view of Mally et al. and Nakajima fails to address and meet each and every limitation set forth in claim 12.

Thus, for the reasons stated above, it is respectfully submitted that the combination of elements set forth in independent claim 12 is not disclosed or made obvious by the prior art of record, including Mayfield, Mally et al. and Nakajima.

Thus, it is believed that independent claim 12 is in condition for allowance and that dependent claims 13-16 are also allowable due to their dependence on allowable claim 12, or due to the additional novel limitations contained therein.

For example, dependent claim 16 recites a novel combination of elements directed to the laminated cheese food package according to claim 12, the package being formed by wrapping the multilayer structure produced by piling said plurality of laminated cheese foods, each of said

plurality of laminated cheese foods having said at least three layers. None of the references cited by the Examiner teaches or suggest a package formed by wrapping a multilayer structure produced by piling a plurality of laminated cheese foods, each having three or more layers, as set forth in dependent claim 16.

In view of the above arguments, all claims of the present application should be deemed allowable.

Accordingly, reversal of the Examiner's rejection based on the above arguments is respectfully requested.

IX. CONCLUSION

For the reasons advanced above, it is respectfully submitted that all claims in this application are allowable. Thus, favorable reconsideration and reversal of the Examiner's rejection of claims 12-16 under 35 U.S.C. § 103, by the Honorable Board of Patent Appeals and Interferences, are respectfully solicited.

Appl. No. 09/675,671
Substitute Appeal Brief dated May 10, 2004
In connection with Notice of Appeal filed June 30, 2003

Attorney Docket No. 4035-0116P
Art Unit: 1761
Page 16 of 20

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. § 1.16 or under 37 C.F.R. § 1.17; particularly, extension of time fees.

Respectfully submitted,

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Attachments: APPENDIX A
APPENDIX B
APPENDIX C

APPENDIX A

CLAIMS ON APPEAL

1-11. (Previously withdrawn).

12. A laminated cheese food , comprising:

a multilayer structure produced by piling a plurality of laminated cheese foods, each of said plurality of laminated cheese foods of the multilayer structure having at least three layers, the at least three layers including:

two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled; and

an intermediate layer of platy food material, wherein the intermediate layer may be formed of a plurality of intermediate layers of platy food material which inherently bond together, the intermediate layer being disposed between and being inherently capable of bonding to the two external layers of platy food material,

wherein each of the plurality of laminated cheese foods of the multilayer structure is releasable from the adjoining ones of the plurality of laminated cheese foods of the multilayer structure.

13. The laminated cheese food according to Claim 12, wherein the platy food material in the intermediate layer is cheese different from the cheese contained in the platy food material in the external layers in type or colour tone, or is cheese having higher maturity, more water or fat, thus being softer, or having lower pH, than the cheese contained in the platy food materials in the external layers.

14. The laminated cheese food according to Claim 12, wherein the platy food materials in the intermediate layer contain foods other than cheese which are in a liquid, paste, powdery, solid, or fibrous state.

15. The laminated cheese food according to Claim 12, wherein:

the platy food materials in at least one of the external layers or the intermediate layer contain additives or raw materials for adjusting colour tone, and
the colour tones of the platy food materials in the external layers or the intermediate layer are the same or different.

16. A laminated cheese food package according to Claim 12, a package being formed by wrapping the multilayer structure produced by piling said plurality of laminated cheese foods, each of said plurality of laminated cheese foods having said at least three layers.

APPENDIX B

FIGURES OF THE MAYFIELD REFERENCE

The non-stick film separating the amorphous layers is shown as: element 20 in FIG 1A; element 24 in FIG 1B; and element 48 in FIG 2

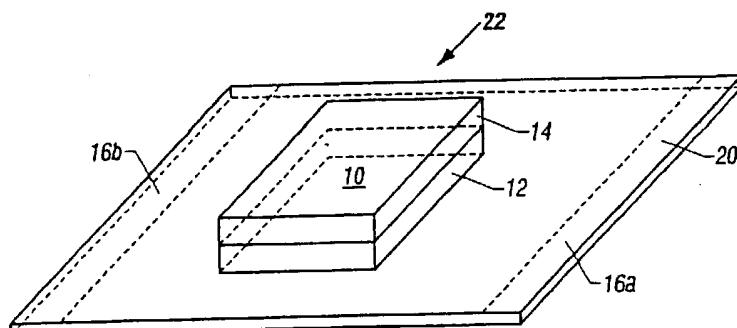


FIGURE 1A

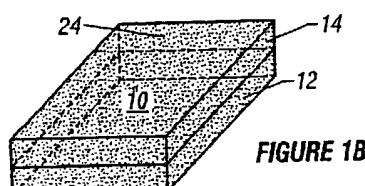


FIGURE 1B

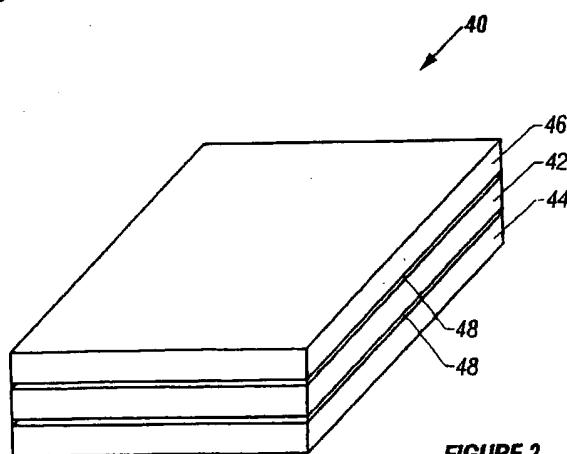


FIGURE 2

APPENDIX C

FIG. 7 OF THE PRESENT INVENTION

